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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,
Petitioner

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42(1), for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 5, 1979. This motion is necessitated by

the refusal of respondents to consent to the filing of the appended brief.[1]

The interest of the *amicus curiae* is set forth in detail in its brief. To summarize, the Chamber of Commerce is the major federation of business and professional organizations, both large and small, with over 94,000 members. Despite tremendous, good-faith outlays of time and money in an attempt to comply with this nation's myriad and complex equal employment laws, compliance has proven to be difficult to achieve.

By creating substantial uncertainty as to when, if, and how, an employer facing liability to employees under the Equal Pay Act, 29 U.S.C. § 206(d)(2), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, can seek contribution from labor unions representing their employees, the appellate court's decision directly impacts a substantial number of the Chamber's members. In particular, the Court of Appeals has totally precluded employers from obtaining contribution from a labor organization, for violation of the Equal Pay Act, no matter how great that organization's culpability.

Moreover by refusing to address the question of whether an employer liable under Title VII can seek contribution from a union, the appellate court has placed the Chamber's members who have or may be sued for violations of that statute in a difficult position regarding both settlement decisions and litigation strategy. That difficulty is further complicated by the D. C. Circuit's apparent suggestion that Petitioner may be barred from seeking contribution by the doctrine of laches, because Petitioner did not assert its

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[1] Petitioner has consented, pursuant to Supreme Court Rule 42(1).

contribution claim early enough in the cause of the underlying discrimination action.

While counsel for Petitioner has more than adequately represented the interests of his client, the Chamber believes that it would be helpful for the Court to be aware of the adverse consequences to the entire business community of the opinion of the Court of Appeals for the District of Columbia Circuit, and accordingly, the necessity for this Court to resolve the issues presented in the petition. The Chamber believes, because of its representation of both large and small business, that it is the appropriate party to bring these factors to the Court's attention.

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States (hereinafter, the Chamber) as *amicus curiae,* urges that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on October 5, 1979.

The Chamber is the major association of business and professional organizations, both large and small, in the United States with a total membership in excess of 90,000 corporations, partnerships proprietorships, and professionals, as well as over 3,700 state and local chambers of commerce and professional and trade associations.

The Chamber regularly represents its members' interests in litigation matters before the courts, the United States Congress, the Executive Branch and Federal Regulatory agencies. Such representation constitutes a significant aspect of the Chamber's activities and includes participation as an *amicus curiae* in numerous cases before this Court.[1]

The United States Court of Appeals for the District of Columbia Circuit has held that an employer subject to monetary liability to its employees for a violation of the Equal Pay Act, 29 U.S.C. § 206(d)(2), may never receive contribution from the union representing its employees, no matter what the extent of the union's involvement in causing that violation. Moreover, that Court has created substantial uncertainty about what circumstances, if any, and in what manner, an employer facing monetary liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, may obtain contribution from a union. Inasmuch as a substantial portion of the Chamber's members are

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[1] *New York Telephone* v. *New York Department of Labor*, —— U.S. ——, 59 L.Ed.2d 553 (1979); *U. of Calif. Regents* v. *Bakke*, 438 U.S. 265 (1978); *Scott Hudgens* v. *N.L.R.B.*, 427 U.S. 507 (1976); *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute, et al.*, No. 78-911 (pending).

subject to these Acts,[2] the decision of the appellate court has an immediate adverse effect on them. The uncertainty created, in particular, by the Court's Title VII ruling will not only have an adverse impact on employers, but the court system as well. For, if any doubt exists as to when a union either must be joined pursuant to Fed.R.Civ.P. 14(a), or a separate action be initiated, it would behoove employers to do so immediately upon learning of a Title VII action. With an ever-increasing number of employment discrimination actions being filed yearly,[3] the increased burden on employers and courts of these added contribution actions is obvious.

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[2] The Fair Labor Standards Act, to which the Equal Pay Act is amended, applies to all employers in industries engaged in commerces or in the production of goods for commerce employing two or more persons. *See* 29 U.S.C. § 202(a); and §§ 203(d), (e)(2), (r)(3), (s)(5) and (x).

Title VII of the Civil Rights Act of 1964 applies to all employers "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000(e)(a).

[3] An average of more than 5,500 Title VII employment discrimination suits have been filed each year in the Federal courts since 1976. *See* Administrative Office of the U.S. Courts, 1979, Annual Report of the Director, Table 30 at 71 (1979). Obviously, if other employment discrimination actions, including Title VII were included, that figure would be far higher.

It is not surprising, therefore, that a recent survey of the 3,000 largest companies in America found that almost half of those companies responding had been subjected to a lawsuit involving affirmative action or EEO matters, and 77 percent had had a formal complaint made by an employee or former employee to an EEO enforcement body. Barnhill-Hayes, Inc., ***Employer Attitudes Toward Affirmative Action,*** pp. 50-51 (April, 1979). ***See also, infra,*** p. 9.

It is for these reasons that the Chamber respectively submits its views.[4]

REASONS FOR GRANTING THE WRIT

A. This Court Should Resolve The Important Question Of Whether An Employer Subject To Liability Under The Equal Pay Act Can Seek Contribution From A Union

The holding of the Court of Appeals that unions are immune from liability under the Equal Pay Act no matter how culpable the union may have been in causing a violation of the Act to occur, is both inequitable and illogical.

In the first place Congress, could have hardly intended such a result. For it not only prohibited employers from discriminating in wages paid to employees on the basis of sex,[5] but in the immediately succeeding section of the statute imposed a concomitant prohibition on unions:

> No labor organization, or its agents, representing employees . . . shall cause or attempt to cause . . . an employer to discriminate against an employee in violation of paragraph (1) . . .

29 U.S.C. § 206(d)(2).[6]

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[4] The Chamber is fully in accord with, and accordingly supports the legal arguments of Petitioner. In filing this brief, it is not our intent to repeat those arguments, but rather to bring to the Court's attention significant policy reasons for granting the Petition.

[5] Section 206(d)(1) provides in relevant part:

> "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . ."

[6] The Chamber does not wish to subject the Court to undue repetition of Petitioner's cogent argument that because courts

If this proscription is to be more than the proverbial "paper tiger," it must be backed by the same remedies that are imposed against employers.

Moreover, in view of the similar purposes of the two statutes, it defies logic for unions to be monetarily liable under Title VII as many courts have held,[7] yet be able to escape liability under the Equal Pay Act, as the D.C. Circuit has held.

This incongruity places the Equal Employment Opportunity Commission in a unique posture. Since 1978, the Commission has been given the responsibility for enforcing the Equal Pay Act as well as Title VII.[8] Obviously, the Commission will have discretion in sex discrimination cases involving disparate wages as to whether to file suit under the Equal Pay Act, Title VII, or both. If the court below were correct, the EEOC's selection of the statute under which it will file

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have allowed direct actions by employees against unions for violation of the Equal Pay Act, and the Secretary of Labor has sought union liability under the Act, a similarly based contribution action by employers against unions exists. Accordingly, we respectfully refer the Court to pp. 10-12 of the Petition.

[7] *See e.g., Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); *United States* v. *United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975); *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977). In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975), this Court noted that:

> "It is the reasonably certain prospect of a back pay award that provide[s] the spur or catalyst which causes employers *and unions* to self-examine and to self-evaluate their employment practices . . ." [Emphasis added.]

[8] Pursuant to Reorganization Plan No. 1 of 1978, § 1, 43 Fed. Reg. 19807 (1978), enforcement authority for the Equal Pay Act was transferred from the Secretary of Labor to the EEOC.

suit would enable it to control whether or not the employer can seek contribution from any union that might be involved.[9] The Chamber believes that there is no justification for, in essence, taking the authority to determine if there should be contribution in a particular case away from the courts and giving it to the Commission.

As this Court has stated:

> Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' *Morgane* v. *States Marine Lines,* 398 U.S. 375, 405.

Albemarle Paper Co. v. *Moody, supra* at 417.

The holding of the appellate court also opens the door for union abuse of the collective bargaining process. A union enjoying immunity from monetary liability may be in a position to bring undue pressure on an employer by bargaining to impasse on a contract clause that may open the employer to Equal Pay Act liability in the hope that the employer will "fold" on contractual provisions that are the union's ultimate objective.

The Chamber believes that all these issues warrant review by this Court. In this regard, the magnitude of the impact of sex discrimination actions on employers, the Commission, and the courts should not be ignored. The EEOC reports that over 30,000 actionable sex discrimination charges (over 40% of the Commission's

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[9] This assumes, of course, that those courts which have held that an employer can seek contribution under Title VII are correct. We, of course, believe they are. *See infra,* pp. 7-10.

total case intake) were filed in 1978 alone.[10] Although there is no way of knowing what percentage of these cases might involve equal pay violations, as opposed to other forms of sex discrimination, it is reasonable to assume that a substantial number may involve disparate wage rates. Moreover, as Petitioner notes prior to transfer of Equal Pay Act responsibilities to the EEOC, the Secretary of Labor had pursued investigations and lawsuits on behalf of over 272,000 employees, resulting in recoveries in excess of $163 million. *See* U.S. Department of Labor, *Report to Congress: Minimum Wage and Maximum Hours Standards Under The Fair Labor Standards Act,* p. 35 (1979).

In view of the foregoing, we respectfully suggest that this Court is justified in granting the Petition to decide the important issues raised regarding the Equal Pay Act.

B. The Court Of Appeals Has Created Substantial Uncertainty Regarding Employers' Right To Contribution From Unions Under Title VII And When Those Rights, If They Exist, Must Be Asserted

Prior to the decision of the D.C. Circuit in this case, it was believed to be fairly well established that unions shared in the monetary liability for discrimination caused in whole or in part by a collective bargaining agreement. *See generally,* Note, *Union Liability for Employer Discrimination,* 93 Harv.L.Rev. 702 (1980). Yet, the appellate court has injected substantial doubt into this belief. Rather than describing the question of the union's liability under Title VII in a suit for con-

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[10] "Actionable Charges by Basis," published by Office of Public Affairs, Equal Employment Opportunity Commission (November 30, 1979).

tribution, as one fairly well established, the court instead described the question as "a complex and sensitive" one. Appendix, p. 12d.

Moreover, the court further exacerbated the uncertainty by raising doubts whether Petitioner's claim for contribution was barred by the equitable doctrine of laches. The court's apparent belief that the doctrine is applicable is particularly disturbing in view of the traditional rule that a right of contribution does not arise until after the underlying action has terminated and the judgment paid, neither of which had occurred here. See W. Prosser, *Law of Torts,* § 50 at 309 and n. 80 (4th ed. 1971).

The appellate court's holding portends a tremendous potential impact on litigation under Title VII. For it would behoove any employer sued for a violation of Title VII to immediately join the union as a third party, even though the employer would not otherwise do so, either because he has doubts as to the validity of the claim or for other reasons. The addition of another party to an action can only complicate and delay it. It can potentially interfere with settlement negotiations, and quite obviously can only have an adverse impact on the unions themselves.

The practical effect of a laches rule would be to impel employers to join unions as co-defendants automatically as soon as they are sued. This result would further complicate American labor relations even though the judicial confrontation between employer and union will have been unnecessary in those cases in which the employee's claim fails on the merits. An employer ought to have the option to defer bringing a potentially unnecessary claim, just as Petitioner opted

here to await a ruling on the merits of the employees' allegations.

Even before the decision of the appellate court, the trend was toward one party to a collective bargaining agreement who was sued for a violation of Title VII, cross-claiming against the others, thereby bringing both the union and the employer before the court, even though the plaintiff failed to do so. *See* B. Schlei and P. Grossman, *Employment Discrimination Law, 1979 Supplement,* p. 135 (1979). Clearly, this is a trend to be discouraged. As employment discrimination cases are unduly complicated, the time and cost to all parties, as well as the burden on the EEOC and federal court system can only escalate.

There can be no doubt that those costs and burdens are already great. Seventy million employees are covered by Title VII. GAO Report by the Comptroller General, *Major Federal Equal Employment Opportunity Programs Should Be Consolidated.* (June 9, 1978). The EEOC reports that almost 75,000 actionable charges were filed in 1979 alone [11] and as we previously noted, Title VII cases filed in the Federal Courts have averaged over 5,500 per year for several years in a row.[12] In view of these statistics, it is not surprising that the previously cited study found that 48 percent of a group of large companies had been subjected to a lawsuit involving affirmative action or EEO matters, and 77 percent had had an employee make a formal complaint.[13]

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[11] "Actionable Charges by Basis," supra.

[12] *See* n. 3, *supra.*

[13] Barnhill-Hayes study, *supra* at 3.

The results of this study are confirmed by those of yet another study which found that 33 percent of the companies surveyed had

These figures are obviously not cited to demonstrate that American business is not attempting to comply with this nation's equal employment laws—the opposite would appear to be the case [14]—but rather to demonstrate the tremendous impact of these laws on both industry and our judicial system.

Any holding, therefore, that unduly complicates and unnecessarily delays the steadily growing number of EEO cases is deserving of immediate review. Moreover, those affected by Title VII, employers, unions and employees, are entitled to a clear exposition of their rights and responsibilities.

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had a state or federal sex discrimination lawsuit filed against them, and 37 percent had signed conciliation or consent agreements, or had court decrees entered against them which involved sex discrimination. R. G. Shaeffer and E. F. Lynton, *Corporate Experiences in Improving Women's Job Opportunities*, p. 77 (1979).

[14] A survey of 48 companies found that their total cost for complying with regulations of the Equal Employment Opportunity Commission was $217 million. Their individual costs ranged from approximately $10 per employee annually to $150 per employee annually. Arthur Andersen & Co., *Cost of Government Regulation* (March, 1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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